whether for consumption on or off the premises requires no licence under section 22(ii), but in certain areas which must be gazetted under the provisions of section 25(i)(f), sale of beer by retail whether by the glass or by the bottle for consumption on the premises where it is sold requires a licence. In these areas therefore, if bottled beer is sold in unopened bottles with the intention that the purchaser should consume it on the premises and facilities are provided for him to do so, the vendor's premises must be licensed.

In the case under revision the beer was sold in a closed bottle, but the bottle was opened by the accused and poured out by him for the purchaser and paid for after consumption. This in my opinion does not constitute a sale of beer in unopened bottles, though it is a sale by retail. The beer could equally well have been poured out of a jug or a glass of beer from a large bottle and it could not be considered a sale of an unopened bottle of beer. For an effective sale of beer in unopened bottles there should be a transfer of the unopened bottle and its contents to the customer leaving it to him to do what he wishes with it.

The situation therefore appears to be (1) as regards sale of bottled beer, that sale in unopened bottles for consumption off the premises requires no licence for sale; (2) that sale of bottled beer in unopened bottles, for consumption on the premises, likewise requires no licence for sale, except in certain gazetted areas; (3) that the sale of beer in unopened bottles must be a delivery to the customer of an unopened bottle and its contents and payment or credit for same.

The transaction in the case under revision therefore fell under sec. 25(i)(b) and required a licence under that sub-section. The conviction and fine were therefore correct and will stand.

Conviction and sentence confirmed.

NAR SINGH AND ANOTHER v. PUBLIC PROSECUTOR.

[Court of Appeal (Willan, C.J., Taylor and Spenser-Wilkinson, JJ.) December 15, 1949]

[K.L. — Criminal Appeal No. 97 of 1949]

Criminal Trial — Accomplice — Evidence of — Testimony of accomplice and of witness who knew of commission of crime but did not disclose it — Degree of credit to be attached to the testimony of such a witness — Misdirection.

So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that the evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case.

Cases referred to :—

(1) *Goh Ah Yew v. Public Prosecutor* (1949) M.L.J. 150.

(2) *Hafijuddi v. Emperor* 38 C.W.N. 777 at p. 779.

CRIMINAL APPEAL.

P. J. D. Regester for the appellant.

H. Shepherd for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

The judgment of the Court was delivered by :—

Willan, C.J. : — In this case the first and second appellants were convicted of the murder of a Chinese named Low Kim at Ooi Bek Weng Estate in the State of Kedah on the 3rd July, 1949. The learned trial Judge and the two assessors unanimously found the two appellants guilty.

The evidence for the prosecution rested almost entirely on that of Govindan, the first prosecution witness, and of Ratnam, the fourth prosecution witness. According to them it was the second appellant who "hacked" the deceased to death with a parang in the presence of the first appellant who urged the second appellant to do so.

In a long and careful summing-up the learned trial Judge first directed the assessors correctly on the law of common intention contained in section 34 of the Penal Code.

The learned trial Judge directed the assessors that Govidan should be classed as an accomplice and that his evidence must be corroborated by an independent witness in material particulars. At the trial defence Counsel submitted that the witness Ratnam was also an accomplice. The learned trial Judge rejected that submission and told the assessors that if they believed the evidence of Ratnam there was the necessary corroboration of the evidence of Govindan.

Mr. Regester, Counsel assigned for the appellant, submitted that the learned trial Judge was wrong in expressly directing the assessors that Ratnam was not an accomplice. Whilst not going so far as stating that

Ratnam was an actual accomplice, Mr. Regester suggested that he should have been regarded as one because there was evidence on the record that :—

(a) Ratnam knew of the intention of the first appellant to commit the murder;
(b) The first appellant advised Ratnam to go into hiding immediately after the murder was committed and he would not have done this if Ratnam had not been concerned in the murder;
(c) Ratnam made no attempt to put out the fire which had been started to cover up the murder;
(d) Ratnam, like the witness Govindan, had been arrested by the police when they came to investigate the murder.

Mr. Regester referred us to several Indian cases to show who is an accomplice. We need not make reference to those cases because they all depend on their own particular facts.

He drew our attention to the judgment of this Court in the case of *Goh Ah Yew v. Public Prosecutor*[1] in which at page 152 the following passage appears :—

"We must dissent from the proposition that it is only one who could be jointly charged with the same offence as the accused who is an accomplice."

and argued from that that the learned trial Judge had directed the assessors in too narrow a sense when he told them :—

"Now an accomplice is a person who is concerned in a crime; he is an associate or one who sustains such a relation to the crime that he could be charged with the accused."

It will be observed, however, that this direction does not conflict with the passage above cited because the learned trial Judge put the matter in the alternative — either an associate or one who could be charged with the crime.

We think it is impossible to lay down a hard and fast rule as to what circumstances will render it necessary to class a witness as an accomplice. Each case must depend, to a large extent, upon its own facts. We desire, however, to express our agreement with a passage from the judgment in the Indian case of *Hafijuddi v. Emperor*[2] which reads as follows :—

"So far as the statutory provisions are concerned there is nothing in law to justify the proposition that the evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. The real question in such a case was the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case."

With regard to the four points put forward by Mr. Regester as showing that the fourth witness was an accomplice we would point out that all these must be considered in the light of the fact that this witness was in a subordinate position to and therefore, to a large extent, under the orders of the first appellant.

We are of opinion that in the circumstances of this case the learned trial Judge was right in holding that the fourth prosecution witness was not an accomplice. He gave the assessors careful directions to enable them to evaluate the degree of credit to be attached to the testimony of this witness; and he concluded his summing-up with a warning that if they had any doubt about the evidence of the first and fourth witnesses their opinions should be that the accused were not guilty.

We therefore held that there had been no misdirection in this case and we accordingly dismissed the appeal.

Appeal dismissed.

YAP FOOK YEW AND ANOTHER v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Spenser-Wilkinson, J.)
December 6, 1949]

[K.L. — Criminal Appeal No. 47 of 1949]

Evidence — Demeanour of witnesses — Identification parade — Defence called upon before close of prosecution case — Criminal Procedure Code, ss. 173(f) and 425.

In this appeal Counsel for the appellants argued that the Magistrate had relied too much upon the demeanour of the witnesses. He admitted that no mention of demeanour was made in the grounds of decision but suggested that, as the Magistrate had given no reason for accepting the evidence of the prosecution witnesses, he must have been guided by their demeanour. Besides the points raised on the hearing of the appeal, the Judge himself observed two irregularities from a perusal of the record. Firstly, his Lordship found on page 14 of the record the following note:—

"Prosecution closed except that one more police witness Corporal 78 may be called later. At present not available."

After this note had been made the first appellant gave evidence from the witness box. The further prosecution witness referred to in the Magistrate's note was then allowed to give evidence. Secondly, it appeared that after all the evidence had been given, both by the prosecution and by the appellants the Court called a witness whose name was mentioned by one of the prosecution witnesses earlier in the case.

Held, (1) that an Appellate Court will always hesitate to over-rule the decision of the judge who has seen and heard the witnesses. The Appellate Court will interfere only when a trial judge has relied upon the demeanour of witnesses in a case where other evidence indicate that such reliance was misplaced; and (2) that if, at the close of the case for the prosecution, further necessary witnesses are not then available the only proper course is either to adjourn until the witnesses are available or to proceed without them. In view of the provisions of s. 173 (f) of the Criminal Procedure Code, it is most important that it should be quite clear when the prosecution case is closed; and, subject to the question of evidence in rebuttal, which is only permitted in exceptional circumstances, the accused should never be called upon for his defence until the whole of the evidence